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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 280.

FUNK BROTHERS SEED COMPANY,
Petitioner,

vs.

KALO INOCULANT COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER.

H. A. TOULMIN, JR.,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8647

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REPLY BRIEF FOR PETITIONER.

Respondent's brief contains unfortunate insinuating and abusive language reflecting upon Counsel. We leave the matter to this Court for such action as it may care to take. *Missouri-Kansas-Texas Railroad Company v. Texas*, 275 U. S. 494; *Kneeland v. American Loan & Trust Co.*, 138 U. S. 509, 513.

The Petitioner, on page 1 of Respondent's brief, is charged with a misinterpretation and distortion of the opinion of the Court below, and with presenting a false issue before this Court. This statement has no foundation except as an utterance of the Respondent.

THE ISSUE PRESENTED.

The issues in this case, from its inception, have been (1) that the Bond theory of inhibition between different species of the legume bacteria is not true as a general condition, and (2) if the Bond theory is true, then Bond in discovering this fact merely discovered the workings of the laws of nature with respect to the functioning of the bacteria in the mixed inoculants of the prior art; and nothing more was added by Bond to constitute invention of a composition of matter.

The claims of the Bond patent include as the alleged feature of novelty the natural functioning of the legume bacteria, namely, that the bacteria do not inhibit one another, but no change in method, composition or mechanism results. (Please note claim 4, Petitioner's brief, page 1.)

When the Court below held "* * * the discovery of a natural phenomenon, or of a quality or attribute of a well-known article and application of that quality in a successful combination which is of value to mankind, is entitled to patent protection;" (R. 824) we submit that the issue, made by the Circuit Court of Appeals, of whether a discovery of a law of nature of the natural functioning of bacteria is patentable, is clearly presented.

The error of the Circuit Court of Appeals, and of the Respondent, is in the assumption that the Bond inoculant was new because of the discovery of Bond, and because it was new, it therefore was patentable.

The essence of Respondent's position is that Bond's alleged discovery of the non-inhibitive character of bacteria was new, and a product which contained this kind of bacteria was therefore patentable. Unfortunately for Respondent, this is not the law, which is nowhere better stated than by Mr. Justice Clifford in *Collar Co. v. Van Dusen*, 23 Wall. 530, 563, 23 L. Ed. 128 when he said:

> "Articles of manufacture may be new in the commercial sense when they are not new in the sense of the patent law. New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production.*
>
> "Nothing short of invention or discovery will support a patent for a manufacture any more than for an art, machine, or composition of matter, for which

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* *Glue Company v. Upton*, 6 Official Gazette, 840.

proposition there is abundant authority in the decisions of this Court.†"

In *Boston Pencil Pointer Co. v. Automatic Pencil Sharpener Co.* (C. C. A. 2) 276 Fed. 910, 912, the Court said:

> "Further, it is settled that articles may be new in a commercial sense, when they are not new in the sense of the patent law (*Collar Co. v. Van Dusen*, 23 Wall. 530, 23 L. Ed. 128), and novelty, however great, can never be put in the place of invention (*Robins v. Link Belt*, 233 Fed. 1005, 148 C. C. A. 15). * * *"

Hence, we do not press lack of novelty by way of anticipation in this Court for the issue is moot. Novelty, utility or commercial success alone will not sustain invention.

The District Court presented the issue, and decided it, as follows (R. 744):

> "I find that the claims in suit of the Bond patent are invalid under our patent statute because they do not involve the invention or discovery of 'any new and useful art, machine, manufacture, or composition of matter.'"

The Circuit Court of Appeals reversed the District Court on this point—that is the issue.

Thus, it is apparent that there are no "concurrent findings of the courts below" on the real issue of the case, as alleged by Respondent on page 8 of its brief.

RESPONDENT'S "RESTATEMENT OF THE FACTS" STATES A PROBLEM THAT WAS NOT IN EXISTENCE.

Respondent, on pages 3 to 8 of its brief, states that mixed inoculants had "fallen into disrepute" merely because they were mixed inoculants, and further states that Bond faced an apparently unsolvable problem. This is

† *Hotchkiss v. Greenwood*, 11 How. 265; *Phillips v. Page*, 24 How. 167; *Jones v. Morehead*, 1 Wall. 162; *Stimpson v. Woodman*, 10 Wall. 121.

See also:

Dunbar v. Meyers, 94 U. S. 187, 196, 197.
Roemer v. Simon, 95 U. S. 214, 217, 218.

incorrect, but even if correct, it would not change the question here presented.

The Respondent admits that mixed cultures were recognized, and their advantages were known, as early as 1907, and that these mixed inoculants were advertised and placed on the market (Respondent's brief, page 4).

If Bond did anything at all, he merely discovered that occasionally, the legume bacteria when mixed together, would have a detrimental effect on one another, and then claimed in his patent a product that does not contain such bacteria. This is merely the use of a new finding of the natural functioning of the bacteria acting according to the law of their nature.

The "Bible" of the inoculant industry published in 1932 and entitled "Root Nodule Bacteria and Leguminous Plants" by Edwin Broun Fred, Ira Lawrence Baldwin and Elizabeth McCoy, University of Wisconsin Studies, referred to in Respondent's brief, page 4, shows clearly that inoculants generally, regardless of whether they were single or mixed inoculants, were not held in high repute. It states (Plaintiff's Exhibit 13, R. 401), "Unfortunately, those in charge of the preparation of these cultures have not always made use of the scientific facts as laid down by the early workers in the field. **The proper application of the scientific discoveries** would no doubt have prevented much of the disappointment and loss from the use of poor cultures."[1] (Emphasis ours.)

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[1] The Respondent, on pages 5 to 7 of its brief, would lead this Court to believe that extensive scientific investigations had been made by those skilled in this art to determine the "causes of the failure of mixed cultures to provide the same degree of nitrogen fixation as single cultures prior to the Bond invention."

Such is not the fact, as admitted by Plaintiff's witness, Robert H. Burris, who stated that "Nobody was particularly interested in it." (R. 349.) At least, the scientific world was not interested in the alleged problem so readily put forward by the Respondent as that which presented itself to Bond at the time of his invention.

(Continued on following page)

THE SEED INOCULANT INDUSTRY IS CONCENTRATED IN OR SUBJECT TO THE SEVENTH CIRCUIT.

Petitioner presents herewith an affidavit of Miles M. Elmers, General Manager of Agricultural Laboratories, Inc., of Columbus, Ohio, of which the Petitioner is a major distributor. His company has assumed the defense of this case and is therefore bound by the decision.

This affidavit is submitted to show the true condition of the inoculant industry for it is believed the affidavit of Myron E. Lusk is based on insufficient or incomplete information. Only passing comment need be made of the

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(*Continued from preceding page*)

The ~~Petitioner~~ RESPONDENT could find no article by any scientist of real repute to support its position and was forced to rely upon one by Max Kronenberger of the Bavarian Cultural Institute for Plant Culture and Plant Protection, Munich, Germany (PX-11, R. 383, 394), as the basis for its statement of the problem that allegedly existed. This article is clearly refuted by the scientific investigations made by Petitioner's expert witnesses in the reports of their investigations (DX-5, R. 446; DX-7, R. 471; DX-13, R. 482 to 487; DX-29, R. 670, 671), which show that the normal expected condition, when the legume bacteria are mixed together, is that a beneficial result will be obtained by the mixture rather than a detrimental effect, as alleged by Bond. Significantly, Kronenberger alleges *every* mixed culture is detrimental; Petitioner's experts found only an occasional possibility of detrimental effect. We leave it to the Court whether Kronenberger, whom Petitioner had no opportunity to cross-examine, or Petitioner's experts, whom Respondent did cross-examine without effect as to the validity of their findings, will be believed.

Respondent's brief, on page 6, would infer that Petitioner's expert, Dr. Lewis Erdman, demonstrated the impracticability of mixed cultures. Dr. Erdman's statement quoted by Respondent could apply only when a plurality of different bacteria are actually *grown* together. This statement does not apply when bacteria are grown separately and then mixed together. Dr. Erdman clearly stated that he could very easily produce the Bond mixed culture merely by mixing bacteria together. (R. 145.)

> "We could grow a pure culture liquid suspension of a selected number of strains of alfalfa group bacteria in one tank. In another tank we could grow the red clover group of bacteria, and in a third tank our selected strains of soybean bacteria. We could mix these suspension separately with the humus and then mix equal portions of the alfalfa, clover and soybean Nitragin. This would be the equivalent of Uni-Culture." (The Bond product.)

affidavit of Mr. Lusk, for when he avers there are two companies manufacturing inoculants for the years 1943 and 1944, to which the United States Department of Agriculture Circular No. 724 refers, he fails to specify the companies. Either they did not exist, or they are too small to be a factor in the industry. One of them could not be the Pearson and Company of Mobile, Alabama for this company was not commercially producing inoculants in 1944.

On the basis of Petitioner's verified assertion of the concentration of the inoculant industry in the Seventh Circuit, the rule applied by this Court in *Schriber-Schroth v. Cleveland Trust Co.*, 305 U. S. 47 applies here.

THE OPINION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

There is no difference between the two opinions[1] of the Circuit Court of Appeals for the Ninth Circuit in the *Vitamin Technologists* case on the law of nature issue.[2] Both opinions held that a newly discovered effect of the workings of a law of nature cannot be patented. (58 U. S. P. Q. 295, 146 F. (2d) 948, 949.) The result has always been there, even though man knew nothing about it.

In the first opinion, the Court stated that "Steenbock's valuable scientific certitudes are discoveries, but

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[1] First opinion reported only at 58 U. S. P. Q. 293. Second opinion reported at 146 F. (2d) 941.

[2] Respondent (pages 15 and 16 of its brief) states that there is no conflict of opinion between the Circuit Courts of Appeals for the Seventh Circuit and for the Ninth Circuit merely for the reason that the Hon. Evan A. Evans, Senior Circuit Judge of the Seventh Circuit, referred to the decision of *Vitamin Technologists, Inc. v. Wisconsin Alumni Research Foundation*, cited in 58 U. S. P. Q. 293, in his speech before the Pittsburgh Patent Law Association, referred to in Petitioner's brief, page 27, and not the final decision of the Court of Appeals for the Ninth Circuit, reported at 146 F. (2d) 941. But, the effect of the decision in 58 U. S. P. Q. 293, and even much of the language, is carried forward into the decision at 146 F. (2d) 941.

they are not inventions within the meaning of the term invention as used by the Congress in its Patent Laws." (Page 295.) (Emphasis ours.) The Court did not retract the statement or reverse itself in the second decision. The Court merely stated that Steenbock did not seek a monopoly of a "natural force" *per se*. The Circuit Court of the Ninth Circuit did hold in the second decision, *as in its first decision*, that the irradiation process had been accomplished "from time immemorial by the farmer in hay-curing in the sun and the coconut grower sun-drying the cut meat of the coconut." (Page 949.)

In the second decision, the Court elaborates its position to say that the use of ultra-violet rays "as a part of a process * * * to activate the antirachitic principle in lipoids processed by exposure to lamp rays" (146 F. (2d) 949) would be patentable, but the idea was old as having been done by natural processes "from time immemorial."

So in this case, while if Bond might have discovered something that man did not previously know, or understand, yet what he discovered has been going on as a natural process in every mixed inoculant ever produced,—the non-inhibited kind of bacteria would not be affected by the presence of other bacteria while the inhibited kind would be.

Certainly, Judge Healy, who wrote a concurring opinion in the first decision in the *Vitamin* case, still believes the issue of the patentability of a discovery of a natural phenomenon and mere use of that discovery without more, is present in the second decision (146 F. (2d) 941), for in the second decision he amplified his first concurring opinion and stated **"I think the Steenbock patents are subject to an infirmity still more fundamental"** (page 954), that the Steenbock invention **"would amount to no more than the ascertainment of a naked fact or principle in nature existing independently of the efforts of the discoverer."** (Page 954.) (Emphasis ours.) This final state-

ment of Judge Healy has previously been referred to in Petitioner's brief, page 25.

Thus, we submit, that since Judge Evans disagreed with the statements in the first *Vitamin* decision bearing on "discoveries" of benefit to man, we can see no conclusion to draw but that he disagrees with the statements in the second decision. Therefore, the decision in *Dennis v. Pitner,* 106 F. (2d) 142, which was cited and followed in the case at bar, and the case at bar, conflicts with the decision of the *Vitamin* case, 146 F. (2d) 941.

THE BOND PRODUCT IS NOT A PATENTABLE COMPOSITION OF MATTER UNDER R. S. 4886.

The Respondent, on pages 19 and 20 of its brief, states that a "composition of matter," only presupposes a combination of elements, and infers by its quotation from *Walker on Patents,* Dellers Edition, Sec. 14, page 55, that all composite articles are patentable whether they be the result of chemical union or mechanical mixture, assuming novelty is present.

The Respondent omitted the real gist of Sec. 14 of *Walker on Patents* when it failed to refer to the case of *P. E. Sharpless Company v. Crawford Farms, Inc.,* 287 Fed. 655, 658 (C. C. A. 2), referred to in Petitioner's main brief page 37, and quoted from in Sec. 14, page 55 of *Walker on Patents* as follows:

> "A patentable composition of matter may well result or be formed by the inter-mixture of two or more ingredients **which develop a different or additional property or properties which the several ingredients individually do not possess in common.**" (Emphasis ours.)

Walker on Patents goes further to state in Sec. 14, page 55:

> "* * * a composition of matter cannot be patented even though it is a product made artificially for the first time, if the product was set forth as a well-known

substance (*Cochrane v: Badische Anilin & Soda Fabrik*, 111 U. S. 293, 311)."

Thus, the Bond mixed inoculant, which is only a mixture of two entirely independently acting elements, does not involve an invention under Patent Statute R. S. 4886 for it does not meet the criteria of a truly patentable composition of matter.

THE CLAIMS OF THE BOND PATENT ARE INVALID WITHIN THE MEANING OF HALLIBURTON OIL WELL CEMENTING CO. v. WALKER, 329 U. S. 1.

The Respondent, on page 24 of its brief, misconceives the decision of *General Electric Company v. Wabash Appliance Corporation*, 304 U. S. 364 in its effort to avoid the effect of the opinion of this Court in *Halliburton Oil Well Cementing Co. v. Walker*, 329 U. S. 1. In the *General Electric* case, the Court stated:

> "But the vice of a functional claim exists not only when a claim is 'wholly' functional, if that is ever true, but also when the inventor is painstaking when he recites what has already been seen, **and then uses conveniently functional language at the exact point of novelty.**[11] " (p. 371.) (Emphasis ours.)

The Bond claims are wholly within the condemnation of the use of broadening functional language at the point of alleged novelty, so aptly quoted from the *General Electric* case by Respondent on page 25 of its brief.

Here, there is no limiting of the Bond claims by the recitation of the non-inhibitive character of the bacteria, for the functional language includes bacteria that not only do not inhibit one another under the alleged Bond invention, but to the contrary, have a beneficial effect on one another. Therefore, through the use of this functional language, the claims are broader than any alleged inven-

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[11] See *Gynex Corp. v. Dilex Institute*, 85 F. (2d) 103, 105; *Davis Co. v. New Departure Co.*, 217 F. 775, 782.

tion of Bond, and are invalid under the decisions in the *General Electric* case and *Halliburton v. Walker*.

Respectfully submitted,

H. A. TOULMIN, JR.,

Attorney for Petitioner.

H. A. TOULMIN, JR.,
D. C. STALEY,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 280.

FUNK BROTHERS SEED COMPANY,
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AFFIDAVIT OF MILES M. ELMERS.

STATE OF OHIO,
COUNTY OF MONTGOMERY, ss:

I, Miles M. Elmers, being duly sworn depose and say:

That I am General Manager of Agricultural Laboratories, Inc., manufacturer of the accused product that has assumed the defense of the above-entitled case, and of which the Petitioner is a major distributor.

I have been engaged in the business of manufacturing and selling inoculants for leguminous plants since 1930, and I am familiar with the inoculant business done in the United States by all of the manufacturers of inoculants and with the inoculants produced by substantially all of the manufacturers.

I have read the Affidavit of Myron E. Lusk, General Manager of Kalo Inoculant Company, Respondent in the above-entitled case, and I cannot agree that the statements contained therein accurately set forth the true conditions in the inoculant industry. I regularly study the business done by Agricultural Laboratories, Inc. to compare it with the general inoculant business done in the United States by the inoculant industry as a whole to determine generally

the percentage of business that is being obtained by Agricultural Laboratories, Inc., and the quality of its products relative to the other major inoculant companies in the industry.

I am entirely familiar with the United States Department of Agriculture publication, Circular No. 724, referred to on page 31 of Petitioner's brief, and with other publications of this same character published by several of the states and state universities. It is my understanding that the publications of the United States Department of Agriculture of the character of Circular No. 724 are the most complete publications showing inoculant products marketed each year in the United States, and the source and manufacturer of the products. The United States Department of Agriculture endeavors annually to pick up samples of every inoculant marketed in the United States to determine its value and to prevent fraudulent products from being sold to the agriculturalist. To my knowledge, the list of manufacturers given in Circular No. 724 is a complete list of all manufacturers of legume inoculants that were of any importance in the inoculant industry during the period which the circular covers, and still represents all of the major manufacturers of legume inoculants.

The Pearson & Company of Mobile, Alabama, referred to by Myron E. Lusk in his Affidavit, first marketed its product in the Fall of 1945, which is subsequent to the period covered by the said Circular No. 724, and has never been a significant factor in the inoculant industry, doing less than 1% of the total business of the industry.

I have made a careful analysis of the inoculant industry based on my knowledge of the business done by Agricultural Laboratories, Inc. and on information I have received from reliable individuals of other major manufacturers of inoculants, and am able to reliably state that the manufacturers listed in Petitioner's brief pages 31 to 33 as those being within the Seventh Circuit, and Agricultural

Laboratories, Inc. do from 90 to 95% of the gross business in the inoculant industry. On the basis of this analysis the business done by the various manufacturers located within the Seventh Circuit, which are all of the major manufacturers of inoculants, except Agricultural Laboratories, Inc., located in the Sixth Circuit, but subject to the decision in this case, can be broken down as follows:

The Nitragin Co., Inc.	Milwaukee, Wisc.	35%
The Albert Dickinson Co.,	Chicago, Ill.	20%
The Urbana Laboratories,	Urbana, Ill.	15%
Kalo Inoculant Co.,	Quincy, Ill.	10%
Agricultural Laboratories, Inc.,	Columbus, Ohio	10%
Hansen Inoculator Co.,	Urbana, Ill.	5%
All others		5-10%

Based on my experience in the inoculant industry, I do not believe the statement of Myron E. Lusk "that over 75% of the total inoculant business done by companies located in or subject to the Seventh Circuit, consists of two single-culture inoculants for two legumes that normally are not grown in the same parts of the country. Consequently, these two single-culture inoculants are never handled in substantial quantities by the same dealers, and the Bond mixed culture therefore has no economic application to these." The companies listed above all manufacture inoculants for clover and alfalfa, to which the Bond mixed culture applies, and these crops are grown universally over the United States, and it is the increasing practice of agriculturalists to sow clover and alfalfa seed together. Consequently, the Bond patent relating to composite cultures for these crops, will have a great economic effect on the raising of these crops.

The inoculant industry is one in which the six manufacturers listed above are substantially the entire industry. The total annual sales are far greater than that indicated by Myron E. Lusk in his Affidavit and were larger in 1941 as calculated at $953,204 by Mr. Lewis T. Leonard, former

head of the United States Department of Agriculture, Bureau of Plant Industry, Soils and Agricultural Engineering, now retired, after a visit to all of the major manufacturers of the industry, a copy of whose letter is reproduced herein and attached to this affidavit.

Based upon my own analysis and on information that I believe to be reliable, received from other manufacturers of inoculants, it is my belief that the inoculant industry today amounts to at least $1,500,000 per year. In addition, there are many billions of dollars of agricultural products that are dependent on the inoculant industry for economical and efficient production.

MILES M. ELMERS.

Sworn to before me this 16th day of September, 1947.

MARIETTA J. REDELBERGER,
Notary Public, Montgomery County, Ohio.

(Notarial Seal)

MARIETTA J. REDELBERGER, Notary Public
In and for Montgomery County, Ohio
My Commission expires June 7, 1948

UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
Research Center,
Beltsville, Maryland

Division of
Soil Microbiology

March 19, 1941

Mr. M. M. Elmers,
Agricultural Laboratories, Inc.,
3415 Milton Avenue,
Columbus, Ohio.

Dear Mr. Elmers:

Since returning from my trip during which I visited all but three or four of the inoculant producers and these latter of minor importance, I have calculated the gross of the industry at $953,204 from the data collected.

I appreciate very much your courteous treatment on the occasion of my recent visit to your plant.

Yours very truly,

LEWIS T. LEONARD,
MPL
Lewis T. Leonard, Bacteriologist.